SINGAPORE REPORTS

Re Gee Hoe Chan Trading Co Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING PETITION NO 98 OF 1989
CHAO HICK TIN J
29 JUNE 1991

Companies and Corporations — Oppression — Failure of majority shareholders to share benefits with minority — Companies Act (Cap 50, 1990 Ed), s 216

The shares in the company were owned by the petitioners and the respondents. Following disputes between the two groups, the petitioners started a lawsuit against the respondents. The petitioners claimed that oppression had occurred on the grounds, inter alia, that they had received very little returns on the shareholding while the respondents had received substantial returns in the form of directors' fees. The petitioners claimed three alternative reliefs — the grant of proportional representation on the company's board of directors, the purchase of the petitioners' shares by the respondents at a price fixed by an independent expert or the winding up of the company.

Held, allowing the application and ordering the winding up of the company:

(1) The non-declaration of dividends was the respondents' way to punish the petitioners. Of the large amount of directors' fees and salaries paid out in the years from 1984 to 1989, only $60,000 was received by one of the petitioners.

(2) It was grossly inequitable that the majority shareholders should make use of their controlling power in both the general meeting and the board of directors to adopt a policy which only benefitted themselves and gave hardly any benefit to the minority.

(3) In appropriate circumstances, the non-payment of dividend could amount to 'oppression' or 'disregard' under s 216 of the Companies Act (Cap 50, 1990 Ed). In the circumstances of the present case, the court would say that there had in fact been oppression.

(4) Once confidence was lost in the respondents, the court did not think that the petitioners were precluded from asking for board representation. In such circumstances, every shareholder was entitled to exercise his rights.

(5) However, it was not practical, having regard that the parties were at logger-heads and mutual trust and confidence were no longer there, to order proportional representation for the petitioners.

Cases referred to

1 *Re HR Harmer Ltd* [1958] 3 All ER 689 (folld)
2 *Scottish Co-operative Wholesale Society Ltd* v *Meyer* [1959] AC 324 (folld)
3 *Phosphate Co-operative Co of Australia Ltd* v *Shears* (1987) 12 ACLR 649 (folld)
4 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (folld)
5 *Re Sam Weller & Sons Ltd* [1990] BCLC 80 (folld)
6 *Re A Company, ex p Glossop* [1988] BCLC 570 (folld)

Legislation referred to

Companies Act (Cap 50, 1990 Ed) s 216
Companies Act 1985 [UK] s 459(1)

David Yeow (*Walter Woon* and *Wilson Wong* with him) for the petitioners.

Cheong Yuen Hee (*Ng Cher Yeow* with him) for the respondents.

Cur Adv Vult

Chao Hick Tin J: This was an application by certain shareholders for reliefs under s 216 of the Companies Act (Cap 50, 1990 Ed) ('the Act'). At the conclusion of the hearing I was satisfied that a case was made out and I ordered that the company be wound up. I now give my reasons.

Gee Hoe Chan Trading Co Pte Ltd, hereinafter called 'the company', was incorporated as a private limited company on 20 December 1960. At the time of the filing of the petition for relief, the main line of business of the company was as commission agent and in investment in real property.

Before the incorporation of the company, there was a partnership business established by one Ng Ah Kim and another Ng Boon Hong. Ng Boon Hong died in 1952. After his death, his interest in the partnership was retained by his widow, Madam Tan Ah Huan (fourth petitioner herein) and his children, Ng Kim Kee, Ng Kim Ming, Ng Kin Yeow and Ng King Leang (the fifth to eighth petitioners herein) and the partnership business was managed entirely by Ng Ah Kim. On the incorporation of the company in 1960, Madam Tan Ah Huan and her children were made shareholders. She was also made a director.

Ng Ah Kim died in 1976. Before his death, most of his shares in the company were bought over by another company, Ng Ah Kim Development Pte Ltd. Ng Ah Kim Development Pte Ltd was and is owned by the respondents. There was a dispute as to the circumstances under which Ng Ah Kim Development Pte Ltd managed to obtain the money to purchase the shares of Ng Ah Kim in the company. The petitioners alleged that the respondents obtained loans from the company to enable Ng Ah Kim Development Pte Ltd to buy the shares of Ng Ah Kim in the company. The evidence would appear to show that the respondents had credits with the company and that the respondents were withdrawing their own money. I was satisfied that there was nothing in this allegation.

At the time of the hearing before me the shareholders of the company and the number of shares held by each, were as follows:

Ng Ah Kim (deceased)	120	0.35%
Ng Ah Kim Development Pte Ltd	4,934	14.60%
Ng Boon Lin (first respondent)	5,484	16.20%
Ng Boon Wah (second respondent)	1,774	5.20%
Ng Boon Hong (third respondent)	2,786	8.20%

Ng Boon Siong (fourth respondent)	1,774	5.20%
Ng Mong Hui (fifth respondent)	1,774	5.20%
Ng Seow Hiong (first respondent's son)	1,286	3.80%
	19,932	58.75%
Tan Poh Tee (deceased)	2,028	6.00%
Ng Boon Hock (first petitioner)	1,694	5.00%
Ng Boon Leong (second petitioner)	1,694	5.00%
Ng Mong Siew (third petitioner)	1,694	5.00%
Tan Ah Huan (fourth petitioner)	4,050	12.00%
Ng Kim Kee (fifth petitioner)	340	1.00%
Ng Kim Ming (sixth petitioner)	1,016	3.00%
Ng Kin Yeow (seventh petitioner)	1,016	3.00%
Ng King Leang (eighth petitioner)	340	1.00%
	13,872	41.00%

The members of the board of directors were the following:

Ng Boon Lin (first respondent)	Chairman and Managing Director Director since 1960
Ng Boon Wah (second respondent)	Director since 1976
Ng Boon Hong (third respondent)	Director since 1960
Ng Boon Siong (fourth respondent)	Director since 1967
Ng Mong Hui (fifth respondent)	Director since 1967

Ng Ah Kim was a director until he died in 1976. Madam Tan Ah Huan ceased to be a director when she failed to get re-elected in June 1988.

The first, second and third petitioners are related to the respondents in that they are half-brothers; the former being children of Ng Ah Kim and his second wife, Madam Tan Poh Tee.

On the death of Ng Ah Kim, the company allowed Madam Tan Poh Tee to draw a sum of $1,200 per month for the support of herself and her children. This was continued even after the death of Madam Tan Poh Tee. It stopped in June 1984. There was a dispute as to the basis upon which Madam Tan Poh Tee and her children were allowed to draw the sum from the company. The first three petitioners said that their entitlement to draw arose from an explicit understanding between Ng Ah Kim and Ng Boon Lin, the latter being then the managing director of the company. On the other hand, the respondents said that Madam Tan Poh Tee was allowed to draw from the company because on his death, Ng Ah Kim had credits with the company and Madam Tan Poh Tee was allowed to draw against those credits. When the credits were exhausted, two of the respondents contributed out of their directors' fees to allow Madam Tan Poh Tee and her family to draw. Later, the drawings were treated as loans from the company.

Just to complete the picture, I ought to state that Ng Boon Lin (the first respondent) and Madam Tan Poh Tee were appointed the administrators of the estate of Ng Ah Kim. However, it would appear that no distribution of the estate had yet taken place. The first three petitioners alleged that there was mismanagement of the estate on the part of Ng Boon Lin; Madam Tan Poh Tee, being illiterate, was just an administrator in name.

The petitioners contended that from the very beginning the company was intended to be, in substance, a family business. They said that they had a legitimate expectation that they would receive a fair share of the profits. The respondents effectively controlled 18,646 shares in the company plus 1,286 shares owned by Ng Seow Hiong, a son of the first respondent. On the other hand, the petitioners collectively owned 11,844 shares. Another 2,028 shares belonged to the estate of Madam Tan Poh Tee, in respect of which estate letters of administration had yet to be taken out.

The grounds upon which the petitioners sought reliefs were that the respondents as majority shareholders and directors:

(i) Had conducted the affairs of the company in a manner oppressive to the petitioners and/or in disregard of the petitioners' interests as members of the company.
(ii) Had exercised their powers as directors in a manner oppressive to the petitioners.
(iii) Had acted and/or threatened to act in a manner which unfairly discriminated against or was otherwise prejudicial to the petitioners.

The petitioners prayed for three alternative reliefs. First, that the petitioners be granted proportional representation on the board of directors, that a nominee of the petitioners be appointed to examine the accounts of the company and that the petitioners be empowered, if the examination warranted it, to commence civil proceedings against the respondents in the name of the company. Second, that the respondents be ordered to purchase the petitioners' shares in the company at a price to be fixed by an independent expert. Third, that the company be wound up. At the close of the hearing and through their counsel, the petitioners indicated that they were not seeking to wind up the company. However, having regard to the total breakdown in relationship between the two sides, the first alternative was no longer feasible. They, therefore, asked for relief under the second alternative.

The complaints

Let me now set out briefly the facts relied upon by the petitioners to prove 'oppression' and 'disregard'. They were broadly the following:

(i) the refusal by the company, acting through the respondents, to allow Madam Tan Poh Tee and her family (the first three petitioners) to draw $1,200 a month from the company as they were made to understand from their husband/father Ng Ah Kim that arrangements had been made to allow Madam Tan Poh Tee's family to continue to draw the sum from the company. Earlier in 1977 it was suggested by the first three petitioners that one way to enable the first respondent to fulfill his obligation towards their father would be to appoint one of the three petitioners as a director so that the family could continue to draw the monthly sum against the director's fees. This suggestion was refused. Instead, the first and third respondents made some other arrangements for the drawing to be continued. Subsequently, there were further discussions for additional persons to be appointed to the board of directors; however, these fell through.

(ii) Madam Tan Poh Tee's family had been occupying certain premises of the company at No 17, Burmah Road since 1969. When the government served notice of compulsory acquisition on the company, Madam Tan Poh Tee's family was not informed. They only knew of the acquisition when an eviction notice was received by them in June 1983.

(iii) In 1984, the fourth to eighth petitioners felt that they were getting very little returns from their shareholdings in the company and decided to sell their shares. Subsequently the first three petitioners were also interested to dispose of their shareholdings. An extraordinary general meeting ('EGM') was requisitioned by the petitioners, which was held on 24 July 1984. The petitioners offered to the respondents to buy up their shares at a fair price or alternatively the company should be wound up voluntarily. The respondents indicated that they could not afford to buy up those shares. It was also generally agreed that it would not be easy to find an outside buyer. The respondents were also not in favour of going into members' voluntary liquidation as the first respondent explained that liquidation would be a long process as a substantial part of the assets of the company was in the form of trade debtors. This would take time. Further, upon liquidation the company would not have immediate cash to pay the bankers for the banking facilities extended to the company and property prices were then depressed. However, the meeting authorized the sixth petitioner to work out a scheme of arrangement/reconstruction with the company's auditors. Subsequently the sixth petitioner submitted a scheme to the respondents involving the selling of the petitioners' shares to another company. Nothing came out of that.

(iv) Following the indication by the petitioners in 1984 that they would like to withdraw from the company, the respondents, in exercise of their powers as majority shareholders and as directors, refused to make the company declare any dividends to the shareholders. But on their part, they continued to draw substantial remunerations (ie salaries as executive directors and directors' fees) from the company. For the years 1984 to 1987, the only petitioner who got any benefit from the company was Madam Tan Ah Huan who received these director's fees : $18,000 in 1984, $18,000 in 1985, $18,000 in 1986 and $6,000 in 1987. In 1988 Madam Tan Ah Huan failed to get re-elected as a director at the annual general meeting ('AGM') and all benefits due to her ceased.

(v) Since 1984, the respondents had failed to render proper accounting to the shareholders in regard to the substantial debts that were owing to the company. The petitioners said that the position became more glaring, when in the report on the 1985 accounts, the auditors stated that 'trade debtors amounting to $1,029,350 (had) been long outstanding and we (were) unable to ascertain if the amounts (were) recoverable in full'. Similar qualifications to the 1986 to 1988 accounts were made by the auditors where the amounts concerned were even larger and where the auditors also stated that 'the directors (were) of the opinion that no further provision for doubtful debts (was) necessary except as disclosed on note 10 to the accounts.' They claimed that though requested, the respondents had failed to provide details on these debts and what steps had been taken to recover them.

(iv) In July 1987, Madam Tan Ah Huan applied to make the sixth petitioner an alternate director but was refused. In early 1988 the sixth petitioner requested, on behalf of his mother, to have access to the accounting records. This was refused by the respondents who said that only Madam Tan Ah Huan would be entitled to see the accounts. As Madam Tan Ah Huan is illiterate and is not versed in such matters, this effectively meant that no inspection could be made. Following that, at the AGM held on 21 June 1988, Madam Tan Ah Huan failed to get re-elected as a director. The quest for further particulars of the bad debts were

taken up at the AGMs on 21 June 1988 and 30 June 1989. At the 1989 AGM, the petitioners also asked the directors to disclose the company's fixed assets and also their interest in any company or firm whose business might compete with the company. But the proposed resolutions on these matters were all defeated.

(vii) Following the failure of Madam Tan Ah Huan to be re-elected as a director, the other petitioners on 28 November 1988 wrote to the respondents requesting the election of Ng Boon Leong (second petitioner) as a director. This was refused. The reason given was, that as the business of the company had scaled down since 1985 at the insistance of the petitioners, there was no necessity to appoint another director. An EGM was requisitioned by the petitioners for this purpose and it was held on 10 March 1989. Due to the opposition of the respondents, Ng Boon Leong was not elected.

Consideration of the complaints

On the affidavits and the evidence before me, I felt that I need only consider three main issues to decide whether a case had been made out for reliefs to be granted under s 216 of the Act. They were:

(i) the question of non-declaration of dividends in respect of the years 1984 to 1988;
(ii) the question of representation on the board;
(iii) the question whether the respondents had managed the affairs of the company diligently and honestly in the interest of all the shareholders, particularly with regard to the recovery of moneys owing by trade debtors.

As I saw it, the other allegations such as whether the respondents were in breach of faith in not allowing Madam Tan Poh Tee's family to draw their monthly sum; whether notice was given by the company to Madam Tan Poh Tee and her children with regard to the acquisition of the property at Burmah Road; and whether the first respondent had discharged his duties as an administrator of the estate of Ng Ah Kim, were really not quite germane to the question whether relief should be granted under s 216 as they had nothing to do with how the respondents managed the company.

From the accounts submitted, the company had been profitable. It was in fact a 'cash-rich' company. Until 1984 (in respect of the accounts for the year ending December 1983), dividends had been declared and paid yearly to the shareholders. As stated above, then in June 1984 the fourth to eighth petitioners decided to sell their shares in the company as they felt that they were not getting much out of the company. On enquiry by the respondents, the fourth to eighth petitioners indicated that they were prepared to sell at $450 per share. The matter was discussed at the EGM on 24 July 1984 where all the petitioners offered to sell but the respondents said that they could not afford to buy up the shares. It was raised again at another EGM on 14 June 1985; in the alternative, the petitioners offered to buy over the shares of the respondents at a price to be determined based on the accounts. The respondents refused. The first respondent explained that if they were to sell they would 'lose face' as it might be misconstrued by the business community that they had 'mismanaged the company'. The first respondent also said that they would rather liquidate the company than allow the petitioners to take over. He then indicated that certain steps should be taken first. Here again, nothing eventually emerged. In a sense, all these were not really material to the question of non-payment of dividends. But they provided the necessary background for a better appreciation of the motive for the non-declaration of dividends.

The respondents explained in their affidavit filed on 24 October 1989 that no dividend was declared because the company did not make much profit during the years 1984 to 1988 due to a slow down in business which was in direct response to the petitioners' request (because they wanted to withdraw from the company) and that it was not possible to declare any dividend. Ng Boon Siong ('RW1'), the fourth respondent, in his evidence gave this added explanation (at p 39 of the notes of evidence):

> About 1983 there was a devaluation of the Indonesian Rupiah. In view of this our clients had to pay more in terms of Indonesian Rupiahs and the companies had difficulties collecting them. We were afraid in case the bank pressed us for payment. Thus the money was reserved and could not be used to declare dividends.

Interestingly at the AGM held on 25 July 1989, when Ng Boon Hock (first petitioner) asked why no dividends were paid for the last few years, the chairman (first respondent) replied that 'there had been discussion on voluntary winding-up in the near future.' This appears from the minutes of the AGM.

Looking at the evidence objectively, I did not think I could accept the explanations of the respondents. The truth was probably, and I do so find, that the respondents were upset that the petitioners had the audacity to question how the respondents managed the company and to even think to withdraw from the company. I am inclined to believe that, the non-declaration of dividends was the respondents' (who controlled both the general meeting and the board of directors) way to punish the petitioners. I think this comes out quite clearly if one were to look at the accounts which are tabulated below:

Year ending	Profit before tax and extraordinary item	Profit carried forward	Directors salaries/fees
1984	$101,339	$2,519.118	$239,023
1985	$ 80,760	$2,523.744	$250,125
1986	$267.607	$2,686.189	$253,390
1987	$ 61,718	$2,736.668	$149,020
1988	$ 18,497	$2,897,385	$139,722
1989	($ 2,451,322)	$ 129,142	$129,442

And of the lot of directors' fees and salaries paid out in those years, only $60,000 were received by one of the petitioners, ie Madam Tan Ah Huan. I have already given a breakdown of the $60,000. She ceased to receive any director's fee for 1988 onwards because she was not re-elected.

Rather ironically in respect of the year 1989, when the company made a loss for the first time, the directors decided to recommend a dividend of 5% involving the paying out of a sum of $116,624. This could not have been a coincidence that the dividend was only approved and paid by the company after the petitioners had instituted these proceedings for reliefs on 28 August 1989.

In my view it was grossly inequitable that the majority shareholders should make use of their controlling power in both the general meeting and the board to adopt a policy which only benefitted themselves and gave hardly any benefit to the minority shareholders. This was not a case of a company which made no profit or had no money to pay out dividends. As the accounts set out above show, the company had been making profits until the year 1989 when a loss was recorded. Every year from 1984 it had carried forward varying sums of profit; the accumulated profits were in the millions. I could not see any justification for depriving the petitioners (including the shares of Madam Tan Poh Tee), who held more than 40% of the shares of the company, a fair return for their shareholdings. On the other hand, what I saw was that of the five respondents, four were holding executive positions in the company and were drawing salaries and bonuses. In addition, each and every one of them obtained director's fees.

Turning to the question of representation on the board, the respondents' counsel argued that the first three petitioners had no expectation of being involved in the management of the company. Similarly was the case for the last five petitioners. Madam Tan Ah Huan was really only a director in name. She left everything to the respondents. Implicit in this argument was the assumption that as the petitioners had all these years allowed the respondents to manage and run the company, they should continue to allow the respondents to do the same.

I entirely understood why up to 1984 the respondents were left in charge of the company. The company was essentially a family concern. As I have said, the first three petitioners and the respondents are half brothers. While their father, Ng Ah Kim, was alive the first respondent was already running the company. After the death of Ng Ah Kim, the first three petitioners being younger in age and following the best of Asian traditions, left everything to the elder brothers who were managing the company's affairs. Rightly or wrongly the first three petitioners and their mother, Madam Tan Poh Tee, were under the impression that they could continue to draw their family expenses from the company. So when Madam Tan Poh Tee and the first three petitioners encountered difficulties in drawing their monthly expenses from the company, they felt that the respondents had breached faith. And one thing led to another. In so far as the last five petitioners were concerned, because of the long standing relations which Madam Tan Ah Huan had with the respondents' father, Ng Ah Kim, they had also allowed the respondents to run the show, being satisfied with their mother drawing the director's fees and they getting the yearly dividends. Once confidence was lost, I did not think the fourth to the eighth petitioners were precluded from asking for board representation. In such circumstances every shareholder was entitled to exercise his rights.

Let me move on to deal with the non re-election of Madam Tan Ah Huan as director. In the affidavit of the respondents filed on 24 October 1989 they said:

> ... shareholders did not deem her fit to be so elected. Madam Tan was on many occasions unable or unwilling to sign resolutions passed by the board and therefore it was in the company's best interest that she not be re-elected. She was also unwilling to sign bank documents which hampered our operations greatly.

Three documents were produced by the respondents to substantiate that: DB50, DB54 and DB58. Two of these documents related to the appointment of proxies of the company and the third related to the acceptance of the renewal of a line of credit offered by Banque Nationale de Paris. However, I noted that all these occurred during the period when Madam Tan was not well and was under medical treatment and when her request for the appointment of an alternate director was turned down by the respondents. If it were in fact true that the refusal of Madam Tan to sign circular resolution had caused delay or difficulties, why did they not accept her request for an alternate? I was inclined to think that all these were just excuses. The respondents felt that the appointment of an alternate to Madam Tan, of someone who was more educated and knowledgeable of business practice and with an enquiring mind, would pose a threat to them. I believed the last straw must be the request of Madam Tan that her son, the sixth petitioner, be allowed to look into the company's accounts on her behalf. That was it. She had to go. So

the easiest way out would be to remove her from the board by not re-electing her. I thought this statement in the affidavit of the respondents was most telling: 'Her literacy is not material as she has always been guided by the respondents and the company's auditors on matters relating to the company's account.' So once she tried to exercise independent judgment she had to be got rid of.

Because of their desire to seek representation on the board, the respondents requested for the convening of an EGM on 10 March 1989 to pass the proposed resolution: 'That Mr Ng Boon Leong be appointed as a director of the company with immediate effect.' But it was lost because the respondents voted against it.

I would add that earlier, on 28 November 1988, when the petitioners sought the respondents' co-operation to elect Ng Boon Leong (second petitioner) as a director to represent them, they were seeking a reconciliation with the respondents. This was what they wrote and I would set out the relevant paragraphs in full:

> 3 As you know, we have on several previous occasions voiced our strong objections to the manner in which the company has been run in complete disregard of our interests. The removal of Madam Tan is the final straw. You are aware that the company originally was set up as a partnership among our fathers and that it was meant as a family company. The board's actions over the last few years have manifested a disregard of the interests of all but yourselves. In particular, we have not been receiving any share of the profits of the company for the last few years.
>
> 4 Despite all of these unhappy events, we are nevertheless willing to let bygones be bygones. We are willing to co-operate with you for the continued prosperity of the company and its members. However, we feel that it is not unreasonable for us to have representation on the board. We propose Mr Ng Boon Leong to be elected as director as soon as possible.
>
> 5 We sincerely hope that you will co-operate in electing Mr Ng Boon Leong. Since we hold a substantial percentage of the company's shares, it is only fair that we have a director to look after our interests. He will participate and contribute to the continued success of the company for the benefit of all the shareholders.
>
> 6 We trust that you will accede to the above and hope that a new period of co-operation and concord will commence, so that the company may continue to prosper and all the shareholders benefit from that prosperity.

The reason given by the respondents for their refusal was that the company's business had scaled down. I did not think that was bona fide or good enough.

The law

Under s 216(1) of the Act, a shareholder could apply to court for reliefs on either of these two grounds:

> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

On either of these two grounds being established to the satisfaction of the court, the court may under s 216(2), with a view to bringing to an end or remedying the matters complained of:

> 2(a) direct or prohibit any act or cancel or vary any transaction or resolution;
> (b) regulate the conduct of the affairs of the company in future;
> (c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
> (d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
> (e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
> (f) provide that the company be wound up.

It was clear that s 216 was introduced to strengthen the position of minority shareholders in limited companies. For relief to be granted the court must find that there is 'oppression' or 'disregard'. The word 'oppressive' in s 216(1)(a) could be construed to mean 'burdensome, harsh and wrongful' — see *Re HR Harmer Ltd*[1] and *Scottish Co-operative Wholesale Society Ltd* v *Meyer*[2] at p 342. In *Phosphate Co-operative Co of Australia Ltd* v *Shears*,[3] Beach J of the Supreme Court of Victoria held that (at p 653) at a minimum 'oppressive' imports unfairness. Of course, it is clear that the fact that a shareholder disagrees with the policies or executive decisions taken by those who formed the majority is not enough.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*[4] which was a case on appeal from the Malaysian Federal Court to the Privy Council and where a provision similar to our s 216 was under consideration, Lord Wilberforce said (at p 229):

> As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play and which a shareholder is entitled to expect before a case of oppression can be made (*Elder* v *Elder & Watson Ltd*): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson* v *Drysdale*). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down

the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Does the fact that no dividends had been declared by the company in respect of consecutive years 1984 to 1988 constitute 'oppression' or 'disregard' within the meaning of s 216(1)(a) of the Act? In appropriate circumstances I am of the view that non-payment of dividends could amount to 'oppression' or 'disregard'. In the circumstances of the present case I would say yes. It will be recalled that the last dividends were declared in 1984 in respect of the year 1983. Only after the present proceedings had commenced did the company declare dividends in 1990 in respect of the year 1989 and that was also the year the company made a loss.

In *Re Sam Weller & Sons Ltd*,[5] the petitioners who held 42.5% of the issued share capital alleged that their interests as members of the company had been unfairly prejudiced by, inter alia, the payment on the insistence of the person in control of the company the same derisory dividend for many years. Under s 459(1) of the English Companies Act 1985, relief will be granted if it is shown that the 'company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of some part of the members.' The court there held that there could be such unfair prejudice to the petitioners even though as members of the company those responsible for the conduct complained of had also suffered the same or even greater prejudice. It also held that non-payment of dividend or the payment of low dividend could amount to conduct which was unfairly prejudicial to some members of the company.

In an earlier case *Re A Company, ex p Glossop*,[6] Harman J expressed the following views on the question of payment of dividends:

> It seems to me that it is important to remember that a company is simply a vehicle for carrying on a business for the benefit of all members. One of the major benefits to shareholders, ie members, in a company is, or ought to be, the payment of dividends. Undoubtedly, directors have an express power to put a ceiling on the amount of dividends paid in almost all (and certainly in this company's) articles. Undoubtedly, directors are responsible for the commercial affairs of a company and should not be forced to pay out moneys which may leave them at risk of trading while insolvent or incurring debts which the company cannot easily meet; that would put directors at peril of committing, at worst, criminal offences and, at lower levels, actions which would be wrong and could be the subject of censure. Undoubtedly, it must be extremely difficult in any case to prove that more dividend should be paid out than has been paid out. But as a matter of concept, it seems to me, it must be capable of being an improper conduct of the affairs of a company to retain in the company for the greater growth and glory of the company profits which could with entire propriety and commercial ease be paid out to members in dividends for the benefit of members.

Findings

What I saw in this case was that for five years from 1984 to 1988 (and many years before that) the respondents had lined their pockets with the profits of the company in the form of either salaries and bonuses (for four of the five respondents) and/or directors' fees. Up to the AGM of 1988, Madam Tan Ah Huan (fourth petitioner) was the only petitioner who obtained any benefits from the company by way of directors' fees. The benefits which the respondents had obtained from the company were out of all proportion to the benefits which the petitioners had gained. In fact, at the time of the filing of this petition, the petitioners were getting nothing at all either in terms of directors' fees or dividends. In my judgment, the respondents had acted in the affairs of the company in their own interest rather than in the interest of the members as a whole. If this was not 'oppression' or 'in disregard' of the interest of the petitioners, I did not know what was.

As it appeared to me, the petitioners (including that of Madam Tan Poh Tee, deceased), as shareholders of more than 40% of the issued share capital of the company, were entitled to proper representation on the board, especially when confidence in the competence of the respondents to manage had been put in doubt following the fact that the auditors had qualified the audited accounts with regard to certain debts. There also appeared to be some reluctance on the respondents' part to disclose the particulars of the bad debtors. Further, the use by the respondents of their voting power to 'remove' the only director who represented the minority shareholders certainly did not enhance confidence in what the respondents were doing. To me it was clear that the reason why the respondents did not re-elect Madam Tan Ah Huan was because they did not want the accounts of the company to be seen by the petitioners as the petitioners were then asking questions through Madam Tan Ah Huan.

The way the respondents represented the status of the trade debtors left much to be desired. The auditors had qualified the trade debtors' account since the year 1985. Similar qualification was also made in respect of accounts of the years 1986 to 1988 where the amounts concerned were even larger. We had the evidence of RW1 that one of the debtors, Toko Spring, stopped making payment since 1985. Toko Spring owed about a million dollars. Why did the respondents not make provision for possible bad debts following the qualification made by the auditors to the 1985 accounts? Why did the respondents represent to the shareholders that everything was well up to 1988 and 1989? Why did the directors keep saying in their annual reports up to 1988 that the directors had taken reasonable steps to 'ascertain that proper action had been taken in relation to the

writing off of bad debts and the making of provision for doubtful debts and satisfied themselves that all known bad debts had been written off and that adequate provisions had been made for doubtful debts'? The court was told that the directors had travelled to Indonesia to try to recover the debts; telephone calls were also made. Letters of demand were also sent. Surely they must know the status of the debts. Why weren't provisions made? Eventually, when they could not hide any longer following the filing of this petition, more than $2m bad debts had to be written off, leading to the result that the company made a loss of $2.4m in 1989, almost wiping out all the accumulated profits.

I was satisfied that the petitioners had established their case under s 216(1)(a) on two grounds, namely, non-payment of dividends and refusal of petitioners' request for representation on the board, and were entitled to reliefs. As regards the way in which the respondents managed the bad debts of the company, while that may indicate a lack of competence or judgment, I entertain some reservations whether that conduct comes within the scope of s 216(1). Since the petitioners had shown that they were entitled to reliefs on other grounds, I do not propose to further examine this point.

I was inclined to give the respondents the option of purchasing the shares of the petitioners at a price to be determined by the auditors based on the accounts; and if the respondents should fail to exercise the option within a reasonable time, I would then order the company be wound up. I did not think it was practical, having regard to the fact that the parties were at loggerheads and mutual trust and confidence were no longer there, to order that the company should continue with proper representation on the board for the petitioners. This would only cause further deadlocks. However, on my indication to the parties at the conclusion of the hearing that the petitioners had made out a case for reliefs, the respondents' counsel, after consulting the respondents who were present in court, told this court that the respondents would not be able to purchase the shares and that in the circumstances, the company be wound up. I accordingly ordered that the company be wound up.

Finally, I ought to refer very briefly in passing to a technical point raised by the respondents' counsel. As pleaded in para 1.1 of the petition, it was alleged that the respondents, the directors and majority shareholders of the company 'have conducted the affairs of the company' and 'have exercised their powers as directors ...'. However, under s 216(1)(a), the petitioners must show that 'the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive ...'. I accepted the submission of counsel for the petitioners that this was really a matter of semantics. The respondents knew precisely what they had to meet. I was satisfied that the affairs of the company were being conducted and the powers of the directors were being exercised in a manner oppressive to the petitioners and in disregard to their interest. If I had thought it really necessary I would have granted leave to amend the petition.

Application allowed.

Solicitors: *Allen & Gledhill; YH Cheong; Boey Ng & Wan.*

Reported by *Terence Tan Bian Chye*

Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 844 OF 1990
GOH PHAI CHENG JC
23 FEBRUARY 1991

Civil Procedure — 'Without prejudice' negotiations — Application to expunge parts of affidavit relating to 'without prejudice' negotiations between plaintiffs and first defendants — Whether expunged parts should apply to proceedings against second defendant as well — Second defendant took no part in the 'without prejudice' negotiations

Civil Procedure — Appearance — Failure to enter appearance — No notice of change of registered address with Registry of Companies — Service of writ at last registered address on record

Civil Procedure — Summary judgment — Application for on proceeds of a dishonoured cheque — Defendant not allowed to set up by way of a set-off a counterclaim for damages for breach of the underlying contract — Counterclaim a separate action and not a tribale issue for setting aside default judgment — Plaintiffs entitled to judgment without stay of execution

Negotiable Instruments — Cheques — Effects of drawing a cheque — Whether cheque should be honoured in absence of a total failure of consideration — Bills of Exchange Act (Cap 23, 1985 Ed), ss 27 & 55

Sale of Goods — Acceptance of goods — When buyer is deemed to have accepted goods from the seller — Sale of Goods Act 1979 [UK], s 35(1)

The plaintiffs were manufacturers of fruit juices, soft drinks and other beverages and the first defendants were customers of the plaintiffs. The second defendant was a director of the first defendants.

In July 1989, a contract was entered into between the plaintiffs and the first defendants for the plaintiffs to produce and supply a kiwi fruit drink in cans to the first defendants' customer in Taiwan. The contract provided that the plaintiffs would produce the fruit juice from kiwi fruit juice concentrate supplied by the first defendants in accordance with certain agreed procedures and the specifications supplied by the first defendants.

The first defendants had paid the plaintiffs an initial part payment and for the balance of moneys due and owing, issued